

AK Steel Corporation and United Steelworkers of America, AFL-CIO-CLC, Petitioner and Armco Employees Independent Federation, Intervenor. Case 9-RC-16343

April 28, 1995

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 26, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on April 29, 1994. The tally of ballots shows 1402 votes for the Petitioner, 1637 votes for the Intervenor, 8 votes against the participating labor organizations, and 28 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings¹ and recommendations, and finds that the election must be set aside² and a new election held.

1. In its exceptions, the Employer argues that the hearing officer erred in considering the Employer's motive in determining whether the Employer's promise to increase the incentive pay of the blast furnace employees was objectionable conduct. It further argues that the hearing officer's analysis is inconsistent with the four-part test applied by the Board in *B & D Plastics*, 302 NLRB 245 (1991). We disagree.

The hearing officer's analysis included consideration of all four elements of the *B & D Plastics* test. He noted the *size* of the benefit (a "substantial improvement" which was "perceived" by employees to rep-

resent "an increase of about \$35 to \$50 per week in employees' pay"). He noted the more than de minimis *number of employees* receiving it: the 105 employees in the blast furnace department. (We agree with him that it is reasonable to infer that the promise of the revised incentive had an impact on the other incentive employees in the unit. Indeed, we note that an Employer witness testified concerning its own manager's expectation that its promise of the revised blast incentive would affect other employees.) He discussed *how the employees would reasonably perceive the benefit*, i.e., as something which they could obtain during the election campaign because the Employer would wish to seek their favor. And finally, and most critically, he discussed the *timing*: the Employer announced the revised plan to employees 3 days before the election, even though it had not been finally approved by all the managers.

Nor can the hearing officer properly be faulted for discussing motive. As a case cited in *B & D Plastics*, supra, makes clear, an employer's business justification for a particular grant of benefit is relevant, and motive is a logical part of that inquiry, i.e., whether the action was taken in order to influence the election. *United Airlines Services Corp.*, 290 NLRB 954 (1988). In the present case, as in others, timing of the announcement is a significant factor.³

Accordingly, we agree with the hearing officer that the announcement of the revised incentive plan for the blast furnace employees just before the election is objectionable conduct that warrants setting aside the election.

2. In agreeing with the hearing officer's finding that the Employer's prohibition of literature distribution at its plant gates was objectionable, we note in particular the timing of the Employer's action. The Employer promulgated and instituted its plant gate no-distribution policy on or about May 22, 1994, just days before the election, and continued it in effect until the date of the election on May 26, 1994. Notwithstanding that there had been widespread campaign literature dissemination prior to that time, the remaining days of the campaign likely would have been marked with the parties' heightened attempts to make last minute appeals to the unit on issues that had become salient in the campaign. The Employer's restriction on distribution could have severely curtailed such communications by barring the distributors from these locations which the other unit employees passed to and from their way to work. Accordingly, we agree that the prohibition of literature distribution at its plant gates interfered with the employees' free choice in the election.

[Direction of second election omitted from publications.]

¹ In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule Objections 8 and 10.

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

² In so finding, the Board agrees with the hearing officer that the Employer's promise to increase the incentive pay of the blast furnace employees (Objection 3) and prohibition on the distribution of literature at its plant gates (Objection 5) constituted objectionable conduct sufficient to warrant setting aside the election, and that each of these instances of objectionable conduct constituted an independent basis for setting aside the election.

Member Stephens agrees, and he would rely solely on those objections. He does not pass on the hearing officer's recommendations to sustain Objections 1 and 2.

In adopting the hearing officer's recommendation to sustain Objection 1, Chairman Gould finds it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

³ See, e.g., *Trump Plaza*, 310 NLRB 1162, 1174 (1993) (retroactive holiday pay); *Speco Corp.*, 298 NLRB 439 fn. 2 (1990).